



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-03-69-T
Date: 10 March 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 10 March 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON THE PROSECUTION'S SECOND
MOTION FOR ADMISSION OF EXHIBITS
FROM THE BAR TABLE**

Office of the Prosecutor

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I. PROCEDURAL HISTORY

1. On 20 December 2010, the “Prosecution Second Motion for Admission of Exhibits from the Bar Table” was filed publicly with confidential annexes A-C (“Motion”), wherein the Prosecution requested admission into evidence of 410 documents (“Proffered Documents”).

2. On 21 December 2010, the Stanišić Defence, in an informal communication, requested that the deadline for its response be extended to 17 January 2011. On 23 December 2010, the Simatović Defence also requested an extension of its deadline to respond to the Motion. On 23 December 2010, the Chamber informed the parties by informal communication that both requests were granted. On 6 January 2011, the Stanišić Defence, in an informal communication, requested an additional extension of the deadline until 1 February 2011. On 10 January 2011, the Simatović Defence joined this request. On 12 January 2011, the Chamber set 24 January 2011 as the new deadline for filing responses to the Motion. On 24 January 2011, the Simatović Defence and the Stanišić Defence sent their comments to the Prosecution to be included in a spreadsheet for a joint filing. On 27 January 2011, the Chamber in an informal communication asked the parties to combine all the submissions in one table to be filed by 1 February 2011.

3. On 27 January 2011, the Prosecution filed its “Resubmission of Confidential Annex A to the Prosecution’s Second Bar Table Motion with Defence Comments” with confidential annex (“Consolidated Submissions”). On the same day, the “Stanišić Response to Prosecution’s Second Bar Table Motion” was filed confidentially (“Stanišić Response”). The confidential “Simatović Defence Response to Prosecution’s Second Bar Table Motion” followed on 31 January 2011 (“Simatović Response”). On 1 February 2011, the Prosecution filed its “Prosecution Request for Leave to Reply to Defence Responses to Prosecution’s Second Bar Table Motion”. The Chamber granted leave on the same day,¹ and on 7 February 2011, the Prosecution filed its reply.²

II. SUBMISSIONS

A. Motion

4. The Prosecution submits that the Proffered Documents are relevant and probative, and provides detailed submissions on their relevance and provenance in Annex A to the Motion.³ It points out that apart from the open source material, all the remaining Proffered Documents have

¹ T. 10838.

² Prosecution Reply to Defence Responses to Prosecution’s Second Bar Table Motion, 7 February 2011 (Public with Confidential Annex) (“Reply”).

been obtained through official channels from government agencies or officials.⁴ Moreover, it argues that pursuant to Rule 94(B), in analysing the authenticity of the Proffered Documents, the Chamber should take into consideration the fact that many of them were found to be authentic by previous Chambers in other trials before the Tribunal.⁵

5. Finally, the Prosecution submits that protective measures for some of the Proffered Documents are subject to pending submissions before the Chamber.⁶ The Prosecution therefore requests that these Proffered Documents be admitted under seal pending resolution of any requests in relation to their protective measures.⁷

B. Stanišić Defence Response

6. The Stanišić Defence opposes the admission of some of the Proffered Documents on three distinct grounds.

7. First of all, it submits that some of the Proffered Documents are in substance witness statements that should have been tendered pursuant to Rule 92 *bis* and 92 *quater*.⁸ It argues that these documents - being statements given to the police - may be presumed to have been provided for use, at least potentially, in domestic legal proceedings.⁹ As a consequence, they fall within the category of evidence usually governed by Rule 92 *bis*.¹⁰ The two remaining grounds of objections to the Proffered Documents are authenticity and relevance.¹¹ The Stanišić Defence's detailed submissions as to each of the objected Proffered Documents are contained in the Consolidated Submissions.¹²

C. Simatović Defence Submissions

8. The Simatović Defence objects to the admission of some of the Proffered Documents on the basis that they lack relevance and/or probative value. Its objections to the Proffered Documents are contained in the Consolidated Submissions.¹³

³ Motion, paras 4, 23-27; Annex A; see Consolidated Submissions.

⁴ Motion, para. 18; Annexes A-C.

⁵ Motion, para. 22.

⁶ Motion, para. 28.

⁷ Ibid.

⁸ Stanišić Response, para. 1.

⁹ Stanišić Response, paras 4-5.

¹⁰ Ibid.

¹¹ Stanišić Response, paras 6-11; Consolidated Submissions.

¹² Stanišić Response, paras 1, 13; Consolidated Submissions.

¹³ Simatović Response, paras 1-2.

D. Reply

9. In its Reply, the Prosecution withdraws one of the Proffered Documents (65 *ter* number 5934) and acknowledges that another document was listed twice in the Motion (65 *ter* number 5944), thus leaving 408 Proffered Documents sought to be admitted.¹⁴ The Prosecution addresses the general as well as the individual Defence objections in the table attached to its Reply.¹⁵

III. APPLICABLE LAW

10. Rule 89 of the Rules of Procedure and Evidence (“Rules”) provides, in relevant part:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

11. The Trial Chamber requires that “the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case”.¹⁶

12. Rule 94(B) of the Rules allows the Chamber, at the request of a party or *proprio motu*, to take judicial notice of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

IV. DISCUSSION

13. The Chamber notes that 65 *ter* number 5934 was withdrawn by the Prosecution.¹⁷

14. The following Proffered Documents have already been admitted into evidence and will therefore not be further considered: 65 *ter* numbers 353 (as P1886),¹⁸ 438 (as P1906), 445 (as P1910), and 1138 (as P2017).

15. The Defence does not oppose admission of the following Proffered Documents and the Chamber is satisfied that they are relevant and of probative value: 65 *ter* numbers 80, 287, 414, 513-516, 524, 727, 765, 776, 778, 1140, 1191, 1193, 1207, 1210, 1214, 1216, 1217, 1219, 1220,

¹⁴ Reply, para. 3.

¹⁵ Reply, Annex A.

¹⁶ Decision on the Prosecution’s Revised First Motion for Admission of Exhibits from the Bar Table, 3 February 2011, para. 11; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 18; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 9.

¹⁷ See *supra*, para. 9.

¹⁸ The Chamber notes that the Prosecution submitted this exhibit for verification of its translation. Once this verification is received, the Prosecution is requested to upload it into E-court and inform the Chamber accordingly.

1223, 1542, 1562, 1563, 1579, 1582, 1637, 1646, 1656, 1694, 1798, 1854, 1946, 2004, 2076, 2082, 2145, 2572, 2631 (MFI P557), 2632 (MFI P558), 2633 (MFI P559), 2634 (MFI P560), 2636 (MFI P562), 2637 (MFI P563), 2639 (MFI P564), 2640 (MFI P565), 2641 (MFI P566), 2642 (MFI P567), 2856, 3760, 3809, 4078, 4283, 4300, 4324, 4328, 4331, 4334, 4355, 4356, 4358, 4360, 4378, 4390, 4398, 4445, 4451, 4652, 4862, 5074, 5084-5116, 5181, 5182, 5908-5912, 5914-5924, 5927, 5929-5933, 5935-5952,¹

6077-6081, 6085-6092, 6095-6111 and 6113-6117. With regard to documents with 65 *ter* numbers 516, 1579, 4445, 5074 and 5107, the Chamber notes that the Prosecution uploaded the full original B/C/S versions but only parts of the English translations. The Chamber considers only those parts of the B/C/S originals for which English translations have been provided to have been tendered into evidence, and therefore requests the Prosecution to upload into E-court only such parts of the B/C/S originals that correspond to the English versions. Moreover, with regard to: 65 *ter* number 1140 – the Chamber admits only page 3 of its original and pages 5-6 of the English translation; 65 *ter* number 2631 (MFI P557) – only pages 3-10 of the English translation; 65 *ter* number 4334 – only pages 15-27 of its original and pages 11-20 of the English translation; 65 *ter* number 4355 – only pages 3-5 of the English translation.

16. 65 *ter* number 5925 is practically identical to 5926. Similarly, there is no substantive difference between 65 *ter* numbers 6082 and 6083, and also between 65 *ter* numbers 6093 and 6094. Of these documents, the Chamber therefore admits into evidence only 65 *ter* numbers 5925, 6082 and 6093, which it finds relevant and of probative value.

17. The Stanišić Defence does not oppose the admission of the following Proffered Documents: 65 *ter* numbers 1182, 1183, 1196, 1564, 1918, 1921, 1935, 2222, 2866, 3823, 4282, 4295, 4297, 4384, 4423, 4424, 4433, 4457, 4671, 4689, 4697, 4731, 4788, 4915, 4916, 4918-4926, 5018 and 5081. Although the Simatović Defence commented upon their relevance, the Chamber considers those comments to be remarks relevant to future weight to be given to the documents rather than objections as such. The Chamber notes at this point that the following 65 *ter* numbers falling within this category are partly redacted: 1921, 1935, 4282, 4295 and 4297. The Chamber, however, finds that these redactions are not of a character precluding their admission. At the same time, with regard to 65 *ter* numbers 1492, 2464, 4382, 4499, 4563, 4576, 4577, 4582, 4584, 4586, 4587, 4589, 4592, 4593, 4595, 4626 and 5079, the Chamber understands the Simatović Defence's comments to be objections to the relevance of these documents. Notwithstanding these comments and objections,

¹⁹ See Stanišić Response, para. 12.

²⁰ Ibid.

the Chamber finds that these documents are of sufficient relevance and probative value to be admitted into evidence pursuant to Rule 89. With regard to the documents with 65 *ter* numbers 4576, 4587 and 4592, the Chamber notes that the Prosecution uploaded the full original B/C/S versions but only parts of the English translations. The Chamber considers only those parts of the B/C/S originals for which English translations have been provided to have been tendered into evidence, and therefore requests the Prosecution to upload into E-court only such parts of the B/C/S originals that correspond to the English versions.

18. 65 *ter* numbers 6017 and 6036 were not objected by the Simatović Defence but only commented upon by the Stanišić Defence. The Chamber finds them admissible under Rule 89. The Chamber also notes the Stanišić Defence's objections to the relevance of 65 *ter* numbers 4495, 5075 and 5913. The Chamber nevertheless finds that the Prosecution has shown sufficient relevance and probative value of these documents. With regard to 65 *ter* number 5075, the Prosecution uploaded the full original B/C/S version but only parts of the English translation. The Chamber considers only those parts of the B/C/S original for which an English translation has been provided to have been tendered into evidence, and therefore requests the Prosecution to upload into E-court only such parts of the B/C/S original as correspond to the English version.

19. Some of the Proffered Documents do not contain visible indicia of authenticity such as stamps or signatures. The Chamber has scrutinised these documents in light of their content and the Defence objections to their admission. The Chamber considers that the fact that some of these Proffered Documents were provided to the Prosecution in response to the various RFAs gives the documents *certain* indicia of authenticity.²¹

20. The Chamber notes the Simatović Defence objection to 65 *ter* numbers 6062-6075. These are handwritten reports, some of which are additionally presented in a type-written form, not bearing any stamps. They were received by the Prosecution from the Republic of Croatia in response to a RFA. The Chamber is satisfied that they are of sufficient relevance and probative value to be admitted from the bar table.

21. The Chamber notes that the authenticity of 65 *ter* numbers 112, 529-530, 777 and 4625, objected to by the Stanišić Defence and/or Simatović Defence, is not self evident. However, 65 *ter* numbers 112, 530 and 4625 have been admitted by Trial Chambers in other cases heard before this Tribunal. Pursuant to Rule 94(B) of the Rules, the Chamber takes judicial notice of authenticity of

these documents. Moreover, the layout of 65 *ter* number 529 is very similar to that of 65 *ter* number 530. Similarly; the form of 65 *ter* number 777 looks similar to that of 65 *ter* number 112. The Chamber therefore finds 65 *ter* numbers 529 and 777 admissible.

22. The Defence objects to the reliability of 65 *ter* number 1583. The Chamber does not fully share the Defence concerns as to authenticity of this document. However, it does not find it sufficiently relevant to admit it from the bar table.

23. The Chamber finds that 65 *ter* number 1845, although not objected to by the Defence, is nevertheless not sufficiently reliable to be admitted through the bar table procedure. Although previously admitted in the *Krajišnik* case, it contains several written markings suggesting it is merely a draft. Moreover, its English translation does not show the typed text subsequently replaced by these markings.

24. 65 *ter* number 2231 contains handwritten markings some of which appear to replace the illegible typed text. Nevertheless, noting the stamp and the signature on the document, the Chamber considers it admissible pursuant to Rule 89.

25. At the same time, the Chamber finds that the following Proffered Documents, which were objected to on grounds of reliability by the Simatović Defence - 65 *ter* numbers 1832, 4329, 2451-2453, 4632, 4661, 4720 and 4912 - and by the Stanišić Defence 65 *ter* number 4733 and 5953, fulfil the requirements of Rule 89.

26. The Chamber notes the Simatović Defence objection to the authenticity of signatures said to be those of Franko Simatović contained in 65 *ter* numbers 1538 and 4917. The Chamber finds that in the absence of any more specific submissions on this issue, the Simatović Defence objections in this matter cannot be upheld.

27. The Chamber notes the Stanišić Defence objection as to the relevance and reliability of 65 *ter* number 6112. The Chamber finds that this document, received from the Republic of Serbia pursuant to a RFA, is relevant and of sufficient probative value. Its English translation, however, appears incorrect insofar as it concerns the name of the individual mentioned therein. The Chamber will therefore admit this document into evidence and requests that the Prosecution seek and subsequently upload the corrected translation.

²¹ See also Decision on the Prosecution's Revised First Motion for Admission of Exhibits from the Bar Table, 3 February 2011, para. 18; Decision on Eighteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 17 December 2010, para. 11.

28. 65 *ter* number 4426 is not properly uploaded into E-court. The Chamber was nevertheless able to track down this document as a part of 65 *ter* number 4257 (pages 62-63 in its original and pages 4-5 of the English translation). The Chamber finds this document admissible pursuant to Rule 89. At the same time, however, it requests the Prosecution to properly upload this document into E-court.

29. The English translation of 65 *ter* number 5076 is not uploaded into E-court. In addition, 65 *ter* number 6084 has its original B/C/S version only partly uploaded. The Chamber will therefore defer its decision on the admissibility of these documents until originals/translations are properly uploaded.

30. 65 *ter* number 6076 does not match the description given by the Prosecution in the Annex to the Motion. The relevance of the document uploaded under this number is not self-evident. The Chamber therefore rejects its admission into evidence without prejudice.

31. The Stanistić Defence does not oppose the admission of the following Proffered Documents: 65 *ter* numbers 1824, 2427, 2597 and 2798. At the same time, the Stanistić Defence points out that the Prosecution in the Annex to its Motion submitted wrong ERN numbers for these documents. The Chamber acknowledges that indeed the ERN numbers of the original versions of these documents are wrongly indicated in the Annex to the Motion, but nevertheless it finds that the documents are sufficiently identified through their 65 *ter* numbers and are properly uploaded into E-court. The Chamber finds them relevant and of probative value.

32. The Stanistić Defence points out that 65 *ter* number 109 was uploaded into E-court in an illegible copy. Subsequently, the Prosecution submitted in its Reply that it has now uploaded a legible copy of this document.²² The Chamber notes that this document is not objected to by the Stanistić Defence and requests that the Stanistić Defence state its position on the document's admissibility within 3 days of the rendering of this decision. At the same time, 65 *ter* number 742, although not objected to by the Defence, has its B/C/S copy uploaded into E-court in an illegible form. The Chamber will therefore defer its decision on the admission of this document until the Prosecution uploads a legible version.

33. The Stanistić Defence objects to the admission of 65 *ter* numbers 2088, 2094, 2097, 2098 and 4342, arguing that they should be considered under Rule 92 *bis* rather than through the bar table

procedure.²³ It submits that since these documents are records of police interviews given some time after the events described in the interviews, they may be presumed to have been provided for use in domestic legal proceedings.²⁴ The Stanišić Defence refers to the Appeals Chamber's ruling in *Galić*, which limits the applicability of Rule 92 *bis* to statements "prepared for the purposes of legal proceedings".²⁵

34. The Chamber notes that the Appeals Chamber's ruling in *Galić* should be placed within its proper temporal context. At the time it was rendered, the relevant part of Rule 92 *bis* read:

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

It is within this context that the Appeals Chamber narrowed the applicability of Rule 92 *bis* to written statements "prepared for the purposes of legal proceedings". In analyzing the ambit of "legal proceedings" within the aforementioned reading of Rule 92 *bis*, the *Slobodan Milošević* Trial Chamber concluded that:

[...]in the opinion of the Trial Chamber, the reference by the Appeals Chamber to material "prepared for the purposes of legal proceedings", was intended to relate to material prepared for the purposes of legal proceedings before this Tribunal".²⁶

Similarly, the *Milutinović* Trial Chamber distinguished between statements given to parties for the purposes of litigation before the Tribunal and statements "given to other entities, such as domestic law enforcement agencies, for use in other courts", stating that the latter may be admissible under Rule 89(C).²⁷

35. On 13 September 2006, Rule 92 *bis* was amended and its applicability was linked to the category of statements given by a witness "in proceedings before the Tribunal":

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

²³ Stanišić Response, para. 5

²⁴ Stanišić Response, paras 4- 5.

²⁵ See Stanišić Response, para. 5, referring to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para. 31.

²⁶ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T; Decision on Testimony of Defence Witness Dragan Jasović, 15 April 2005, p. 4.

²⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 13.

36. In light of the above, the Chamber finds that the admission into evidence of 65 *ter* numbers 2088,²⁸ 2094, 2097, 2098 and 4342, which were given outside the context of legal proceedings before the Tribunal, is subject to Rule 89.²⁹ The Chamber considers that they are relevant and of probative value, and finds that their admission is not outweighed by the need to ensure a fair trial pursuant to Rule 89(D).

37. Finally, the Stanišić Defence did not object to 65 *ter* number 1221 which appears to fall within the same category of statements given to other entities. The Chamber finds this document, which is relevant and probative, admissible pursuant to Rule 89.

V. DISPOSITION

38. For the reasons set out above and pursuant to Rules 89 and 94(B) of the Rules, the Chamber:

GRANTS the Motion in part;

ADMITS into evidence the following Proffered Documents: 65 *ter* numbers 80, 112, 287, 414, 513-516, 524, 529, 530, 727, 765, 776-778, 1182, 1183, 1191, 1193, 1196, 1207, 1210, 1214, 1216, 1217, 1219-1221, 1223, 1492, 1538, 1542, 1562-1564, 1579, 1582, 1637, 1646, 1656, 1694, 1798, 1824, 1832, 1854, 1918, 1921, 1935, 1946, 2004, 2076, 2082, 2088, 2094, 2097, 2098, 2145, 2222, 2231, 2427, 2451-2453, 2464, 2572, 2597, 2632 (MFI P558), 2633 (MFI P559), 2634 (MFI P560), 2636 (MFI P562), 2637 (MFI P563), 2639 (MFI P564), 2640 (MFI P565), 2641 (MFI P566), 2642 (MFI P567), 2798, 2856, 2866, 3760, 3809, 3823, 4078, 4282, 4283, 4295, 4297, 4300, 4324, 4328, 4329, 4331, 4342, 4356, 4358, 4360, 4378, 4382, 4384, 4390, 4398, 4423-4424, 4426, 4433, 4445, 4451, 4652, 4457, 4495, 4499, 4563, 4576, 4577, 4582, 4584, 4586, 4587, 4589, 4592-4593, 4595, 4625, 4626, 4632, 4661, 4671, 4689, 4697, 4720, 4731, 4733, 4788, 4862, 4912, 4915-4926, 5018, 5074, 5075, 5079, 5081, 5084-5116, 5181, 5182, 5908-5925, 5927, 5929-5933, 5935-5955, 5957-6075, 6077-6082, 6085-6093 and 6095-6117;

PARTLY ADMITS into evidence the following Proffered Documents: 65 *ter* numbers 1140 – (page 3 of its original and pages 5-6 of the English translation), 2631 (MFI P557) (pages 3-10 of the English translation), 4334 – (pages 15-27 of its original and pages 11-20 of the English translation),

²⁸ The Chamber acknowledges that the ERN numbers of the original version of this document are wrongly indicated in the Annex to Motion, nevertheless it finds that the document is sufficiently identified through its 65 *ter* number and properly uploaded into E-court.

²⁹ See also *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Admission of MUP Official Notes and Reasons for the Decision to Deny the Admission of the Official Note of Ivan Čermak, 30 January 2009, para. 10 (confidential).

4355 – (pages 3-5 of the English translation), and **REQUESTS** the Prosecution to upload into E-court only the relevant parts of these documents;

DEFERS its decision on the admissibility of 65 *ter* numbers 109, 742, 5076 and 6084;

DISMISSES the remainder of the Motion;

INSTRUCTS the Prosecution to upload into E-court only the relevant B/C/S parts of 65 *ter* numbers 516, 1579, 4445, 4576, 4587, 4592, 5074, 5075 and 5107;

INSTRUCTS the Prosecution to properly upload 65 *ter* number 4426 into E-court;

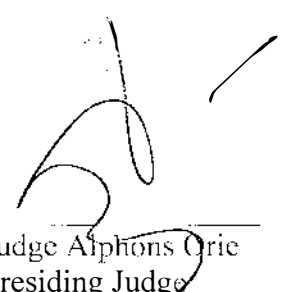
INSTRUCTS the Prosecution to upload corrected translation of 65 *ter* number 6112 into E-court;

INSTRUCTS the Simatović Defence to state its position as to the admissibility of 65 *ter* number 109 within 3 days of the rendering of this decision;

REQUESTS the Registry to place the following Proffered Documents, admitted in the present decision, under seal, pending the resolution of the protective measures requests currently before the Chamber: 65 *ter* numbers 80, 513-516, 2004, 2572, 2856, 4356, 4358, 4378, 4390, 4426, 4445, 4451, 4862, 5074-5075, 5079, 5084-5116, 5181-5182, 5908-5925, 5927, 5929-5933, 5935-5955, 5957-6061, 6077-6082, 6085-6093 and 6095-6117;

REQUESTS the Registry to assign exhibit numbers to the documents admitted and to inform the Chamber and the parties of the numbers so assigned.

Done in English and in French, the English being authoritative.



Judge Alphons Orie
Presiding Judge

Dated this tenth day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]